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# Pragmatism, Precepts and Precedents: Commercial Law and Legal History

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## **Introduction: Angelo and the History of Insurance and Bills**

It is an honour and a privilege to be asked to give this Law Agency Lecture in commemoration and celebration of Angelo Forte.<sup>1</sup> I first met him in 1980, in Glasgow at a gathering which he and David Fergus had initiated to discuss setting up a Scottish Legal History Group. The success of that idea can be measured by noting that the Group continues to meet annually, having held its first conference in 1981. Re-reading much of Angelo's published work in preparation for this event has brought back so much else: our time as colleagues in Edinburgh, our collaboration in authorship, our mutual editing of each other's work, going to innumerable conferences and meetings together, acting as each other's external examiner at every level of study, and, above all, lots

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<sup>1</sup> This is a revised and expanded version of the Law Agency Lecture delivered at Aberdeen on 8 March 2013. I have however sought to maintain the style and tone of a lecture as this paper is meant more to prompt further questions than to formulate definitive answers. My researches owe much to the English and Scottish Law Commission teams working on the Commissions' joint project on insurance law and also, separately, on consumer law. The following frequently cited works are usually referenced in their most recent edition or reprint: James Dalrymple Viscount Stair, *Institutions of the Law of Scotland* (6th edn, Edinburgh, 1981); William Forbes, *Institutes of the Law of Scotland 1722–1730* (Edinburgh, 2012); Andrew McDouall Lord Bankton, *An Institute of the Law of Scotland 1751–3* (3 vols, Edinburgh, 1993–5); John Erskine, *An Institute of the Law of Scotland* (8th edn, 1871; Edinburgh, 1989); George Joseph Bell, *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* (7th edn, 1870; Edinburgh, 1990); idem, *Principles of the Law of Scotland* (4th edn, 1839; Edinburgh, 2010). This is generally because the edition or reprint in question reproduces the text in the form last given to it by the author. With Forbes' *Institutes*, citations are to the page number of the reprinted edition, in preference to using the appallingly complex reference system that he himself devised; further, the easiest way into the MS. of his *Great Body of the Law of Scotland* as presented online at <http://www.forbes.gla.ac.uk/contents/> (accessed 22 March 2016) is by its foliation.

of enjoyable and stimulating conversations about law, history and much else besides, all reflecting our many over-lapping enthusiasms. Perhaps we bonded most in the late 1980s, however, when we took our daughters, each pre-school and much the same age, to Christmas pantomimes at the King's Theatre in Edinburgh, there to mortify them both by our exuberant over-engagement with demands from the stage for audience participation.

One area where I must admit our interests did not overlap much if at all was to 'go down to the sea in ships [and] do business in great waters'.<sup>2</sup> But even as one who tends to turn green at the very thought of setting foot on any sea-going vessel bigger than a motor-launch, I did find enthralling Angelo's vivid descriptions of his days as a crewman on fishing boats in the stormy waters of the North Sea and beyond. His enthusiasm and excitement about boats and the sea carried over, as I will try to show in a moment, into his academic research, and also into the public presentations of its results. I will never forget the relish with which he informed a bemused audience – the January 1998 Conference of Scottish Medievalists – that Polynesian sailors on inter-island voyages in the Pacific detected wave rhythms by the swing of their testicles.<sup>3</sup> I believe that Angelo was principally responsible for the chapter on 'Sailing the North Atlantic' in the co-authored book *Viking Empires*; certainly much of it is underpinned by personal observation and knowledge of how small wooden boats and their crews behave on the open sea. Swinging Polynesian testicles appear again, albeit this time accompanied by the wry comment that 'We must discount this possible means [of navigation] in more northerly climes.'<sup>4</sup>

Angelo's passion for boats and the sea above all informed his interests in the law, especially commercial law, and its history. Ships and other vessels have been of central importance to commerce from time immemorial; not just across the seas, moreover, but also on inland waters. It is no coincidence that most of Europe's major cities are either ports or places with ready access to significant rivers, or both. Until the last couple of centuries, carriage of goods by land for any distance was at best a much slower and more laborious business than doing so by water; and more could be carried in the latter way as well. The early products of the Industrial Revolution reached their markets

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<sup>2</sup> Psalms, 107, 23.

<sup>3</sup> In the published version this information is discreetly tucked away in a footnote: Angelo D. M. Forte, "'Kenning be Kenning and Course be Course': Maritime Jurimetrics in Scotland and Northern Europe 1400-1600", *Edinburgh Law Review*, 2 (1998), 56–88, 65, fn. 49.

<sup>4</sup> Forte, Richard Oram and Frederik Pedersen, *Viking Empires* (Cambridge, 2005), 346, fn. 60.

by canal, and only the successive comings of the railway line, tarmacadam, the internal combustion engine and powered flight transformed the position overland. Even now, however, as a visit to any modern container port will readily confirm, carriage of goods by sea remains a critical part of the global economy.

It was not so much the law of carriage by sea that Angelo focused on, however, even though he did touch upon it more than once in his writings, in both contemporary and historical settings. He was, of course, interested by the law of contract, which applies throughout commercial law, and this includes the hire, or chartering, of ships and the placing of goods on board them for carriage from one place to another. But amongst the several kinds of commercial contract he gave most attention to the law of insurance contracts. This was linked, I think, to various other interests: problems of risk generally; the use of standard form contracts and their concomitant, the regulation of unfair contract terms; and the gap between what the law appeared to say and its operation in practice under various 'soft law' devices provided through the insurance industry itself. But at least in part his interest may also have been connected with the significance of insurance in shipping transactions, and the fact that the governing statute on the subject in the United Kingdom was (and still is, at the time of writing) the Marine Insurance Act 1906, c.41.<sup>5</sup> A crucial invariable of ships transporting goods across the seas is risk, both to the ship itself and to the goods being carried; insurance is, and has been for a long time, the most important way of laying off those risks for those who would otherwise have to bear the losses should any of them materialise.

Angelo's first major historical study, published in 1987, confirmed the unsurprising fact that maritime commerce provided the initial setting for the use of insurance in Scotland.<sup>6</sup> Where he broke new ground was in an argument that, under Dutch rather than English influences, insurance began to be Scottish merchants' preferred method of allocating risk in the latter part of the seventeenth century and became widespread in the eighteenth, even although case law did not really emerge in any significant quantity in the Court of Session until after 1780. The first Scottish book on the subject, *Elements of*

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<sup>5</sup> Note however the Consumer Insurance (Disclosure and Representations) Act 2012, c.6, which modifies the 1906 Act considerably in its application to consumer insureds. Further, more wide-ranging, reform was brought about by the passage of the Insurance Act 2015 but still much of the 1906 Act remains intact.

<sup>6</sup> Forte, 'Marine Insurance and Risk Distribution in Scotland before 1800', *Law and History Review*, 5 (1987), 393–412.

*the Law Relating to Insurances* by John Millar junior, also appeared as late as 1787.<sup>7</sup> Angelo's article might have been timed to mark a bicentenary, but I think it was in fact coincidence! Whatever the truth of the matter, the study laid the basis for continuing work on the history of insurance law in Scotland over the next two decades, and also led Angelo ultimately to rather wider conclusions about the development of commercial law in Scotland, particularly in the vital century after the Anglo-Scottish Union of 1707.<sup>8</sup>

The most interesting finding published in these subsequent papers was the Court of Session's practice, documented by Angelo from cases between 1774 and 1808, of seeking the opinion of 'eminent English counsel' specialising in insurance law whenever the court was confronted with a new problem in the field.<sup>9</sup> They included such as John Dunning of the Middle Temple, 'one of the ablest barristers of the time'; James Alan Park of Lincoln's Inn, author of *A System of the Law of Marine Insurances* (first edition 1787); and Samuel Marshall, serjeant at law and author of a *Treatise on the Law of Insurance in Four Books* (first edition 1802).<sup>10</sup> Angelo liked to quote from the opinion of Lord Hailes in one of the earliest of these cases, *Stevens v Douglas* in 1774, mentioning Dunning alongside, indeed ahead of, a trio of leading English judges of the period:<sup>11</sup>

We in Scotland are in the helpless infancy of commerce. On a mercantile question, especially concerning insurance, I would rather have the opinion of English merchants, than of all the theorists and all the

<sup>7</sup> The book was published in Edinburgh.

<sup>8</sup> See the following papers by Angelo: 'John Millar junior – a Biographical Sketch of a Minor Jurist of the Eighteenth Century' in A. J. Gamble (ed.), *Obligations in Context: Essays in Honour of Professor D. M. Walker* (Edinburgh, 1990), 67–78; 'Opinions by "Eminent English Counsel": Their Use in Insurance Cases before the Court of Session in the Late Eighteenth and Early Nineteenth Centuries', *Juridical Review*, [1995], 345–64; 'Insurance' in K. G. C. Reid and R. Zimmermann (eds), *A History of Private Law in Scotland* (2 vols, Oxford, 2000), II, 333–68; "'Calculated to our Meridian'": The Ius Commune, Lex Mercatoria and Scots Commercial Law in the Seventeenth and Eighteenth Centuries' in E. C. Reid and D. L. Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (Edinburgh, 2005), 120–37.

<sup>9</sup> An opinion by John Dunning, barrister, akin to those he and others gave in insurance cases of the period can be found in the Session Papers for the literary property case of *Dodsley v MacFarquhar* 1775 Mor. 8308: see Session Papers, Advocates Library (Edinburgh), Campbell Collection, vol. 26, no. 78; Session Papers, Signet Library (Edinburgh), vols 166 (no. 7) and 347 (no. 2).

<sup>10</sup> Forte, 'Opinions by "Eminent English Counsel"', 358–63 (quotation at 360). Both the books cited were published in London and ran to several subsequent editions.

<sup>11</sup> *Stevens v Douglas* (1774) Mor. 7096; Fol. Dic., III, 328; Lord Hailes, *Decisions of the Lords of Council and Session from 1766 to 1791* (Edinburgh, 1826), December 16, 1774.

foreign ordinances in Europe. The opinion of the English merchants is for the defender on the point of law, without contradictory voice. To the same purpose we have the judgment of English Courts, and the opinion of an eminent lawyer, Mr Dunning. It is vain to say that Mr Dunning does not understand the law of commerce: [...] Our Scottish insurances are copied from the English: for an interpretation of words in such copy, am I to go the original, or the ordinances of Amsterdam and Stockholm? I can have no doubt of the law: it is the law of Mr Dunning, Sir Joseph Yates, Lord Camden, and Lord Mansfield.

The practice of seeking English counsel's opinion faded away in the first half of the nineteenth century as the expectation grew that Scottish counsel should be able to refer to and discuss the English position in an intelligent fashion; but there continued the sense that on insurance matters Scots law should not deviate too far from the law in England. Another of Angelo's favourite quotations was from the case of *Strachan v McDougle* in 1835, where Lord Balgray said:<sup>12</sup>

I have some doubt whether the case should be decided with reference solely to the law of Scotland. Policies of insurance are a new species of instrument, which are of recent introduction in England, and are still more recent here [...] I am doubtful, therefore, whether a question of this character should not be viewed as belonging to the law mercantile, and whether we ought not to see more of the English practice and decisions in such cases, before we determine in this cause.

This all said, Angelo also recognised later that, at any rate up to 1800, English law was not the only source referred to in insurance matters. John Millar junior wrote 'within the *ius commune* tradition of scholarship' and when he referred to English writers they were 'those whose works conceived of the *lex mercatoria* as based on the *ius gentium* and pan-European mercantile custom'.<sup>13</sup> Counsel pleading in cases before the Court of Session cited *ius commune* material as well as English decisions and writers; despite Lord Hailes' powerful dictum in 1774, it was only in the nineteenth century that there was a decisive turn away from the law merchant in favour of the Common Law of England as

<sup>12</sup> *Strachan v McDougle* (1835) 13 S. 954, 958–9. The omitted passage is quoted below. See text accompanying note 76.

<sup>13</sup> Forte, "Calculated to our Meridian", 126.

the primary point of reference. Although the Marine Insurance Act 1906 took twelve years to reach the statute book after its introduction as a Bill in 1894, there does not seem to have been any controversy about its codification of English law applying throughout the United Kingdom, in contrast to what had happened with what became the Sale of Goods Act 1893.<sup>14</sup> Lord Balgray's dictum in *Strachan v McDougle*, however, actually shows that the earlier approach, distinguishing between purely domestic law and the trans-national law merchant (of which English law and practice might be powerful evidence), had by no means faded completely from view by 1835. I will return to this point below.

In his final contribution on the eighteenth-century development of commercial law, Angelo extended his inquiry beyond insurance to bills of exchange, and sketched what he thought was a broadly similar picture of a move away from *ius commune* understandings to an increasingly exclusive reliance on English authorities.<sup>15</sup> Unlike insurance, of course, bills were a well-established feature of Scottish mercantile life long before 1707.<sup>16</sup> The two editions of William Forbes' *Methodical Treatise Concerning Bills of Exchange*, published in 1703 (Edinburgh) and 1718 (Edinburgh) respectively, well illustrated the *ius commune* approach to the subject in Scotland, within which English writings were to be seen as potentially indicative of the *ius gentium* and mercantile custom, of which the law of bills formed part. By the later eighteenth century, although there was no practice of seeking the opinion of eminent English counsel in bills cases, 'counsel were increasingly turning to English cases as primary authorities in their pleadings.'<sup>17</sup> A hundred years later, the Bills of Exchange Act 1882 codified English law and with some minor amendments was applied to Scotland.<sup>18</sup>

<sup>14</sup> See A. F. Rodger, 'The Codification of Commercial Law in Victorian Britain', *Law Quarterly Review*, 108 (1992), 570–90, 586, wherein it is noted briefly that the Marine Insurance Bill 'staggered uncertainly' on to the statute book as the commercial codification movement lost its impetus.

<sup>15</sup> Forte, "'Calculated to our Meridian'", 123–6, 128–36. See further on the whole subject A. M. Godfrey, 'Ratio Decidendi and Foreign Law in the History of Scots Law' in S. Dauchy, W. H. Bryson and M. C. Mirow (eds), *Ratio Decidendi: Guiding Principles of Judicial Decisions. Volume 2: Foreign Law* (Berlin, 2010), 81, 102–4.

<sup>16</sup> See e.g. Siobhan Talbot (ed) 'The Letter Book of John Clerk of Penicuik, 1644–45' in *Miscellany of the Scottish History Society* (Woodbridge, 2014), 1–54, passim; and note the merchant Clerk's reluctance to go to law in cases of mercantile dispute (*ibid.*, 33).

<sup>17</sup> Forte, "'Calculated to our Meridian'", 131.

<sup>18</sup> Rodger, 'Codification of Commercial Law', 578–9.



The process was also apparent in the work on the subject of George Joseph Bell, who did not ignore the *ius commune* authorities but in general gave primacy of authority to English cases; here following, Angelo argued, rather than seeking to lead practitioners. Indeed, as Angelo recognised, Bell himself counselled against excessive use of English authority and the risk in departing too far from the *ius commune* as a result. But in this he was swimming against the current of the times and the in-coming tide of professional opinion and practice.<sup>19</sup> Angelo narrated in his professorial inaugural at Aberdeen the lesson which he drew from the outstanding figure of Bell:<sup>20</sup>

For me, Bell epitomises the genius of Scots law, then, as now, with regard to commercial matters. It is a system characterised historically by a process of what has been described as “willing borrowing and adaptation”. Bell’s objective in writing his *Commentaries* was to look at Roman law, continental jurisprudence, and English law, “all the cases and authorities with the greatest freedom”, in order to devise a rational, coherent, set of rules applicable to a wide variety of commercial dealings. No single component is regarded as being intrinsically more important than the others: although there is a clear and pragmatic realisation that in many cases it would not be prudent for Scottish commercial law to be too out of step with that of England.

The other, more general conclusions which Angelo offered on the development of Scots commercial law were mainly in critical reaction to the views of Sir Thomas (T. B.) Smith – and also, more mutedly, those of J. J. Gow and Andrew Dewar Gibb – who in a previous generation had argued that the eighteenth century was the last classical age of Scots law as a Civilian system, including its commercial law, with Anglicisation being primarily the result of interventions from Westminster in the nineteenth century, through either legislation or decisions of the House of Lords. Instead, Angelo suggested, the process of de-Civilianisation was ongoing and intensifying throughout the eighteenth century and was largely driven from inside Scotland, in particular by the bench and bar and also, if more ambiguously, by legal writers and in particular Bell.

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<sup>19</sup> Ibid., 133-6; Bell, *Commentaries*, I, preface, xi.

<sup>20</sup> Forte, ‘A Great Future Behind It? Scottish Commercial Law and the Millenium [sic]’, *European Review of Private Law*, 2 (1994), 375–97, 383.



### Widening the Scope of Analysis

If Angelo were here today, the conversation I would like to have with him on his view of the history of the development of commercial law in Scotland would start from the observation that perhaps his evidence base needs to be expanded so that his conclusions can be tested more widely. While insurance and bills of exchange are obviously important commercial subjects, they are perhaps not at the absolute heart of commercial law. Instead I would suggest that the core of the subject is provided by the law of sale and that nearly everything else in commerce revolves around sales. It is also an important point that bills of exchange and insurance were unknown to Roman law and (especially insurance) were relatively modern developments in 1700. The question of where these two subjects fitted into the Roman structure of contracts which Scots law certainly had received by Stair's time was one of the difficult questions of the late seventeenth and early eighteenth centuries, at least in Scotland. I will start with this latter point before turning to the former.

We can tell that the Roman structure of contracts had been received in Scotland by Stair's time, because he spends a lot of words in his famous chapter on conventional obligations rejecting, re-working or restricting it.<sup>21</sup> For Stair, contract was based upon the will, or consent, of the parties to become engaged to each other; in a memorable aphorism, 'every paction produceth action.'<sup>22</sup> The four categories of contract in Roman law – 'either perfected by things, words, writ or sole consent', with only sale, location or hire, partnership or society and mandate in the last group – had been overtaken in Scotland, so that 'not only these, but all other promises and pactions are now valid contracts by sole consent, except where writ is requisite.'<sup>23</sup> This therefore covered the real contracts, under which a party had to hand over to another possession of some item of property as the first stage of performance of the contract. Stair dealt first with loan, where the receiver either became the owner but had eventually to return an equivalent (*mutuum*, particularly applicable to money), or simply a possessor for a time bound to return the same thing (*commodatum*, distinguished from location by being gratuitous).<sup>24</sup> The other real contract was custody or deposit, under which the receiver held the property for the other party who, however, remained owner; the transaction was distinct from

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<sup>21</sup> Stair, *Institutions*, I,10.

<sup>22</sup> *Ibid.*, I,10,7.

<sup>23</sup> *Ibid.*, I,10,11.

<sup>24</sup> *Ibid.*, I,11.

location in that the custodian had no right to use the deposited property while the owner had no obligation to pay for the service.<sup>25</sup>

Stair noted that the Roman escape route from the potential rigidities of its categories had been the innominate contracts,

which have not a special name and nature acknowledged in the law; and therefore oblige not by sole consent, but the giving or doing of the one party obligeth the other, as permutation, excambion, or exchange, when either a thing is given for another, or a thing is given for a deed, work, or use, or one deed or work is done for another, for which the law hath no special name; and therefore names them, *do ut des, do ut facias, facio ut facias*.<sup>26</sup>

Unless one party had ‘given’ or ‘done’, the mere agreement to give or do in this way was *nudum pactum* and either party could withdraw or resile. These innominate contracts of exchange could also be found in Scots law, and according to Stair included bills of exchange (‘money for money’) and ‘the contract of assurance, where money or things are given, for the hazard of anything that is in danger, whether it be goods or persons.’<sup>27</sup> Perhaps, however, it was as a matter of practical commercial reality that Stair dealt with bills of exchange in his chapter on loan as well.<sup>28</sup>

Stair accepted that Scots law still had the Roman nominate contracts. But the only use of the distinction between nominate and innominate contracts, he went on, was that while in all contracts parties had to perform not only that which was expressed but also that which was necessarily implied, the law had determined the implications of the nominate contracts.<sup>29</sup> The importance of this for bills of exchange and insurance was that their effect depended upon the express terms of the contract and anything further that could be implied therefrom; the law itself gave no further guidance. Further, permutation – barter or exchange – was ‘congenerous’ with sale, and not to be regarded as any longer amongst the innominate contracts.<sup>30</sup>

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<sup>25</sup> Ibid., I,13.

<sup>26</sup> Ibid., I,10,11.

<sup>27</sup> Ibid., I,10,12.

<sup>28</sup> Ibid., I,11,7.

<sup>29</sup> Ibid., I,10,12.

<sup>30</sup> Ibid., I,14 (here departing from the Roman characterisation of the contract as innominate: see further Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town, 1990), 532–7).

Writing a generation later, William Forbes paid little if any attention to Stair's arguments about the basis of contract and reinstated orthodoxy – the Roman structure of contract law – with little qualification. A contract 'is an Engagement betwixt two or more Persons, effectual to force Performance by an Action'.<sup>31</sup> Contracts are either real ('perfected by the Intervention of Things given or done'<sup>32</sup>); or verbal; or written; or, finally, 'perfected by sole Consent'.<sup>33</sup> Real contracts are loans, deposit, exchange or excambion, and (without any elaboration) insurance.<sup>34</sup> The only contracts perfected by sole consent are the Roman group: sale, letting and hiring, partnership, and mandate or commission.<sup>35</sup> Forbes then introduces a non-Roman mixed form, the contract 'perfect, partly by Writ, partly by Consent', and it is here that he places the bill of exchange.<sup>36</sup> Forbes thus had nothing to do with Stair's innominate contracts of exchange, made insurance a real contract presumably because the insured paid a premium for which a return would only be forthcoming upon events not certain to happen, and invented a new category – his one departure from traditional orthodoxy – to cover exclusively bills of exchange.

Moving on another generation, Bankton, who in general followed Stair in his structuring of the law, and did not treat the Roman law categorisations as definitive of the Scots law of contract, declared that the 'distinction of contracts into Nominate and Innominate, is of no use with us', so that parties to an agreement for an innominate exchange were nonetheless bound by the agreement alone. The concept of contracts by word was also not used in Scotland; while the Scottish rules on writing requirements were very different from contracts by writing in the sense of the Roman law.<sup>37</sup> But 'contracts, perfected by consent, are governed mostly with us by the same rules as in the civil law', the main examples being mandate, society, sale (including barter) and location.<sup>38</sup> He also treated together the real contracts of loan and deposit, separating them, however, with a chapter on bills.<sup>39</sup> In Bankton's view a bill of exchange 'is similar to *mutuum* [i.e. loan]' but 'partakes likewise of mandate

<sup>31</sup> Forbes, *Institutes*, 183. See also idem, *Great Body*, f. 781.

<sup>32</sup> Forbes, *Institutes*, 183; idem, *Great Body*, f. 788.

<sup>33</sup> Forbes, *Institutes*, 184; idem, *Great Body*, f. 825.

<sup>34</sup> Forbes, *Institutes*, 185-91; idem, *Great Body*, ff.788-818.

<sup>35</sup> Forbes, *Institutes*, 197-207; idem, *Great Body*, ff. 825-77.

<sup>36</sup> Forbes, *Institutes*, 207-11; idem, *Great Body*, ff. 880-98.

<sup>37</sup> Bankton, *Institute*, I,11,18-22 (quotation at 20).

<sup>38</sup> Ibid., I,11,63.

<sup>39</sup> Ibid., I,12-14. The whole of ibid., I,13 is devoted to the subject of bills of exchange.

and exchange, and is a compound of all three, and has something farther peculiar to itself.<sup>40</sup> Insurance, on the other hand, ‘is a kind of sale, for thereby the assured purchases security to his goods for a certain premium given to the assurers’;<sup>41</sup> and so Bankton treated the subject (at some length) in the same chapter as sale, i.e. as a consensual contract.<sup>42</sup> Part of Bankton’s method was to make comparison with the law of England: of insurance he wrote, ‘the law is the same in both parts of the kingdom, as being regulated by the mercantile law, which is part of the law of nations, and received into the law of England.’<sup>43</sup> Bills, he said, were ‘governed by the same law and usage of merchants in England, as in other trading countries, and likewise with us.’<sup>44</sup>

John Erskine was more like Forbes in dealing with contract law in a very Romanist way. He has only one paragraph on contract in general in his *Institute*, dealing with incapacity and invalidity by reason of error, fraud, and force and fear.<sup>45</sup> He then goes on, within a couple of paragraphs, to describe the following particular contracts (loan, deposit, trust, and pledge), which for him are clearly the real contracts, as at the end he talks about the innominate real contracts, even although for him modern doctrines have moved on from Roman law: ‘By our law all contracts, even innominate, are equally obligatory on both parties from the date, so that neither party can resale.’<sup>46</sup> His subsequent chapters become even more visibly Roman in their structure: the first deals with ‘Obligations by word and by writing’ (which is mostly about writing requirements), and the next with ‘Obligations arising from consent, and of accessory obligations’. The obligations by consent include not only the expected sale (together with permutation), location, society or copartnery, and mandate, but also, quite independently of the others, insurance (as an aspect of the location, or chartering, of a ship).<sup>47</sup> Erskine thus did not follow Stair, Forbes or Bankton on the categorisation of insurance. Bills of exchange are dealt with in a Forbes-like way, however, in the chapter on obligations by word and by writing, with Erskine seeing them as a form of mandate, i.e. consensual, but always in writing, albeit informal.<sup>48</sup>

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<sup>40</sup> Ibid., I,13,1.

<sup>41</sup> Ibid., I,19,28.

<sup>42</sup> Ibid., I,19,1–37 (permutation and sale), 38–46 (policy of insurance).

<sup>43</sup> Ibid., I,19,19 (paragraphs 20–4 deal further with English law on insurance).

<sup>44</sup> Ibid., I,13, Observations on the Law of England, 1.

<sup>45</sup> Erskine, *Institute*, III,1,16.

<sup>46</sup> Ibid., III,1,35.

<sup>47</sup> Ibid., III,2,17.

<sup>48</sup> Ibid., III,2,25–38.

### Hume And Bell

All this has been said to show how the classical writers on Scots law differed on, or even struggled with, how to fit insurance and bills into their frameworks of the law, however orthodox or unorthodox they might be in their presentation of these matters. These struggles came to a sudden end with the Edinburgh Professors of Scots Law in the late eighteenth and early nineteenth centuries, Baron David Hume and George Joseph Bell. They simply by-passed the Roman structures and indeed, in Hume's case, the idea of any general theory or law of contract as distinct from contracts.<sup>49</sup> Bills and insurance became quite straightforwardly particular forms of contract alongside sale, hire and all the others. As early as Bankton's time, English law was being given attention in the exposition of the law on both subjects, but very much in the fashion identified by Angelo; that is, bills and insurance were part of the *ius gentium* or the mercantile law, received in England as in Scotland, and therefore deserving notice by Scots lawyers. In Hume's hands, however, discussion of insurance required extensive reference to English texts and cases, quite outweighing the native material; but without any mention of a wider legal background that might justify this approach.<sup>50</sup> Again, but in notable contrast, in his lectures on bills, Hume's predominant source by far was the Scottish case law, while the wider legal background, English or otherwise, was again practically ignored.<sup>51</sup> Perhaps for insurance at least Hume, occupant of the Edinburgh Chair of Scots Law from 1786, would merit more attention as an agent of the change of approach from talk of English law within the *ius gentium* to simple deployment of English cases and writers as the authorities to which reference had to be made for the law. But if so, we might also want to know why, as Angelo did point out, he stopped lecturing on insurance altogether after session 1809–10 when he still had a dozen years to go before he finally quit the Chair.<sup>52</sup> For both insurance and bills the key point is that Hume did not refer to wider notions of the law merchant or the *ius gentium*. His focus was on the decisions of the courts, Scottish and, where necessary, English.

<sup>49</sup> See further Hector MacQueen, 'The Law of Obligations in Scots Law' in Reiner Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Munich, 2013), 213–43, 218–22; and more generally John W. Cairns, 'Historical Introduction' in Reid and Zimmermann (eds), *History of Private Law in Scotland*, I, 166–72.

<sup>50</sup> Baron David Hume, *Lectures 1786–1822* (6 vols, Stair Society vols 5, 13, 15, 17, 18, 19, Edinburgh, 1939–58, henceforth 'Hume, *Lectures*'), III, 310–402.

<sup>51</sup> Hume, *Lectures*, II, 228–75.

<sup>52</sup> Forte, 'Marine Insurance', 393.

His successor cannot be simply lumped in with Hume on these matters, however. Bell did of course refer extensively to English law treatises and precedents in his writings, and not just in relation to insurance and bills. But he explained his reasons for doing so, and also for referring to other foreign material, including in particular French and US law as set out in the great treatises and commentaries of Pothier, Story and Kent.<sup>53</sup> While he did not use or attempt to fit Scots law into the Roman structures, Bell differed from Hume in standing firmly in the school of the law merchant and the *ius gentium*. He perhaps articulated and practised that approach more than any other Scottish lawyer before or since.<sup>54</sup> It is apparent in the *Principles* that he produced for his students, while the *Commentaries* in particular are shot through with it. There can be no doubt that Bell sought to make Scots law fit for a commercial and mercantile world. So he recognised a general law of contract and unilateral voluntary obligations (within which he placed bonds, cautionary obligations, bills of exchange and promissory notes), and divided what he called mutual contracts into first, sale, then hire, agency, maritime contracts and, finally, insurance. The structure of the law was governed more by mercantile functionality than by Roman categories.

Bell may however have stated his approach to and understanding of his subject most clearly in his last, indeed, posthumously published and so perhaps least-read, work, *Inquiries into the Contract of Sale of Goods and Merchandise: as recognised in the Judicial Decisions and Mercantile Practice of Modern Nations*. In the introduction to this work, which appeared in 1844, Bell argued that the forms and rigidities of municipal or domestic law were not always well suited to the needs of commerce, and that in consequence rules and usages had arisen amongst merchants generally which had then been recognised by the laws of all commercial countries as the law merchant:<sup>55</sup>

<sup>53</sup> K. G. C. Reid, 'From Text-book to Book of Authority: the *Principles* of George Joseph Bell', *Edinburgh Law Review*, 15 (2011), 6–32, 22–8.

<sup>54</sup> Bell may thus have had a more activist conception of the law merchant than Sir John Baker has argued was the prevalent view in England before, during and after Bell's time: see J. H. Baker, 'The Law Merchant and the Common Law before 1700', *Cambridge Law Journal*, [1979], 295–322; John Baker, 'The Law Merchant as a Source of English Law' in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford, 1999), 79. See also Warren Swain, 'Lawyers, Merchants and the Law of Contract in the Long Eighteenth Century' in Matthew Dyson and David Ibbetson (eds), *Law and Legal Process: Substantive Law and Procedure in English Legal History* (Cambridge, 2013), 186.

<sup>55</sup> George Joseph Bell, *Inquiries into the Contract of Sale of Goods and Merchandise: as recognised in the Judicial Decisions and Mercantile Practice of Modern Nations* (Edinburgh, 1844), 2.

Under this system, [...] new instruments of debt and credit are introduced in the form of Bills and Notes, affording a rapid and safe mode of transmitting money from country to country, and a convenient circulating medium among merchants. [...] [T]he law of Insurance gradually arises, by which misfortunes, from the dangers of the sea or enemy, are mitigated; and losses, which would otherwise crush a single merchant, are spread among many adventurers, to whom they even become a source of gain, while the merchant immediately concerned is rendered safe.

Elsewhere Bell had already argued that Roman law ('nearest, perhaps, of any code of written law, to [...] universal jurisprudence'<sup>56</sup>) was not adequate for contemporary commercial purposes and that it had accordingly been developed significantly in Scotland even where outright innovation had not been required as in the cases of bills and insurance:<sup>57</sup>

In Rome, commerce and its relations and facilities were discouraged, or not regarded with favour. In the world as now constituted, they form the very object, and supply one of the ruling principles, of the jurisprudence of contracts. Instead of the amicable and gratuitous MANDATE, there has been introduced the onerous contract of agency or factory, the relation of principal and agent, imposing duties more imperative, entitling the principal to more entire reliance on the performance of his orders, and raising with third parties relations of great extent and importance in trade. Instead of SOCIETY, an arrangement merely for the joint management of a common subject, the important contract of PARTNERSHIP has brought into combined operation, for the extension of modern commerce, the skill, the industry, and the capital of many associated persons.

In the *Inquiries* Bell went on to explain that while uniformity was desirable in the international and trans-national law merchant, it was not always achieved thanks to its inevitable interaction with municipal laws:<sup>58</sup>

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<sup>56</sup> Ibid., 6–7.

<sup>57</sup> Bell, *Commentaries*, I, 506.

<sup>58</sup> Bell, *Inquiries*, 7–8.



A concise view of the differences which have thus arisen, and which sometimes amount to inconsistency, and are productive of embarrassment in their effects, may be of use, not only in making those differences better known, but in pointing out the cause or principle from which they have arisen, or even, perhaps in suggesting some reconciling ground on which they may be compromised; and it cannot well be said that the Law-Merchant is a system of universal application, till the great rules, in which all agree, shall be distinguished, and the exceptions and peculiarities marked out for observation. Such is the object of this work. It is directed to an investigation into the differences which are to be found in different countries relative to the important contract of Sale of goods and merchandise; [...] my object being only to investigate the principles on which mercantile usage may be brought more nearly to a common standard in different countries.

His study therefore extended beyond Scotland and England to the U.S.A. (where ‘the Judges in the Supreme Courts, in determining any unsettled question in mercantile law, have examined, with a liberal and learned spirit, the principles of Roman law, the doctrines and precedents of the English and Scottish laws, and the authorities and decisions in continental Europe’<sup>59</sup>), and to France and Holland (which had specialist *tribunaux de commerce* subject to appeals to *cours royaux*). Bell indicated that his intention was ‘to extend the inquiry’ beyond sale ‘into the other branches of mercantile and maritime law’;<sup>60</sup> but the publisher’s prefatory note to the *Inquiries* tells us that while Bell ‘had for some time been engaged in the preparation of a series of similar Treatises on other subjects relative to Commercial Law’, the present volume was ‘the only one which he had finally revised for publication’.<sup>61</sup> It would be a matter of some interest to know what other commercial topics Bell proposed to address in the series, and how far his work on them had got before his death.

### Some Further Thoughts on Insurance

The conflicts between municipal law and the law merchant which Bell sought to reconcile can be seen in some of the insurance cases reported in *Morison’s Dictionary* and discussed by Angelo. He noted that the earliest case in *Morison*

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<sup>59</sup> Ibid., 6.

<sup>60</sup> Ibid., 7.

<sup>61</sup> Prefatory Note to Bell, *Inquiries*.

was dated 1755.<sup>62</sup> But, like Angelo, this reader's impression from that and the later cases is not of insurance as a novelty at that point. Merchants seem to be well accustomed to taking out insurance on both foreign and coastal or inland water journeys, with the underwriters being their fellow merchants, increasingly from the same port that was the insured's principal place of business, although still sometimes also from places outside Scotland, whether in England or elsewhere. While Angelo may well have been correct to see the practice as having been learned from abroad, he was certainly right to see it as fully understood and established as a means of risk-spreading between merchants in Scotland by the middle of the eighteenth century.<sup>63</sup> There is also fairly frequent reference to brokers practising in Edinburgh and Glasgow to bring together groups of underwriters for particular voyages while also gathering in from insureds the premiums for transmission on to the underwriters. The existence of such brokerage businesses surely confirms the normality and regular, ongoing flow of marine insurance as an essential element in a burgeoning trading economy.<sup>64</sup> A final general impression from the printed reports is that many of the cases come before the Court of Session only after earlier proceedings in the Admiralty Court; so that marine insurance appears to be one of the areas where in the later eighteenth century the Lords of Session were asserting, by way of various procedural and remedial devices, their superiority over the Judge Admiral. The conflict would end only in 1830 when the Admiralty jurisdiction was absorbed by the Court of Session.<sup>65</sup> The

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<sup>62</sup> *Lutwidge v Gray* (1755) Mor. 7109 (taken from Woodhouselee's *Folio Dictionary*, vol. 3, 333–4). There is a problem with the dating of this decision: see further *Lutwidge v Gray* (1732) Mor. 10111 (taken from Kames' *Folio Dictionary*, vol. 2, 59), reversed by the House of Lords (1734) 1 Pat. 119.

<sup>63</sup> Between 1766 and 1770 James Boswell was acting in a Court of Session case about the insurance of a cargo of sugar consigned to Glasgow (from the West Indies?): Hugh M. Milne (ed.), *The Legal Papers of James Boswell* (Stair Society vol. 60, Edinburgh, 2013), 50–54. I owe this reference to Hugh Milne.

<sup>64</sup> See Bell, *Principles*, § 219, 2(4): 'Insurance-brokers are also special agents for effecting insurance, selecting proper underwriters, arranging the premium and terms of the policy, and keeping an account on the one hand with the assured, and on the other with the underwriters, debiting or crediting each with the premium, as middleman for settling the payment of it.'

<sup>65</sup> Lord Cooper of Culross, 'The Central Courts after 1532' in G. C. H. Paton (ed.), *An Introduction to Scottish Legal History* (Stair Society vol. 20, Edinburgh, 1958), 341–9, 346–7. Boswell's case (1766–70) had reached the Court of Session from the Admiralty Court (above note 62). On admiralty jurisdiction before 1830 in general see now I. MacLagan, 'The Maritime Rights of the Magistrates of Rothesay' in Hector L. MacQueen (ed.), *Miscellany VII* (Stair Society vol. 63, 2015), 265–366.

lack of Court of Session cases before 1755 may therefore simply be because before that time disputes in this area were the unchallenged preserve of the Admiralty or other more local courts.<sup>66</sup>

We can thus see marine insurance as something that had indeed been developed by merchants amongst themselves well before it ever came into serious contact with the judges, advocates and other lawyers who practised in Parliament House in Edinburgh. The sort of conflict to which this might give rise can be seen in *Selkrig v Pitcairn and Scott*, a case decided by the Court of Session in June 1808 and one of those in which the opinion of English counsel was sought before the judgment of the court was handed down.<sup>67</sup> The dispute arose from the bankruptcy of an underwriter who, in accordance with what was apparently universal practice, had yet to receive any premiums on certain policies that he had subscribed. The insured parties and their brokers withheld payment of the premiums on the basis that insurance was a mutual contract, the argument being that ‘it is a general rule of our law, that in a mutual contract, a party cannot demand implement of the obligation *de presenti* of the other party, if it appears that he would not be able to implement his own counter obligation *de futuro*; and this rule equally affects those who, by bankruptcy, come to take the place of either of the parties.’<sup>68</sup> The opinions of the English counsel consulted were clear that this would not be the position in England, with the reason being that the insurance policy signed by all parties stated that the premium had been paid, whether or not in fact it had been. Accordingly the broker’s debt to the underwriter was not conditional but absolute, and the unpaid premiums could be recovered by the bankrupt’s trustee.<sup>69</sup> The debate then became one of whether or not this was the result of

<sup>66</sup> Note the account of the Admiral’s jurisdiction in William Welwood, *An Abridgement of All Sea Lawes* (London, 1613), 11 (‘all complaints, contracts, offences, pleas, exchanges, *assecurations* [emphasis supplied], debts, counts, charter-parteis, covenants, and all other writings concerning lading and unlading of shippes, fraughts, hyres, monie lent upon casualties and hazard at sea’). ‘Assecuracion’ is interpreted as insurance in T. C. Wade (ed.), *Acta Curiae Admirallatus Scotiae 1557–62* (Stair Society vol. 2, Edinburgh, 1937), xvii. See further Scott Styles’ contribution to the present volume.

<sup>67</sup> *Selkrig v Pitcairn and Scott* 1808 Mor., ‘Insurance’, Appendix, No. 10 (31-9); F.C., June 14, 1808. Note also the distinguishing of the previous case of *Bertram v Richmond and Freebairn’s Trustee* 1802 Mor. 7122, where the issue arose in the broker’s insolvency but the underwriter succeeded in recovering the premiums from the broker’s trustee. The opinion of English counsel Mr Wood in this case is appended to the report of *Selkrig* alongside those obtained from James Park, Sir Vickary Gibbs, and Serjeant Marshall in the latter proceedings (1808 Mor., ‘Insurance’, Appendix, 38-39).

<sup>68</sup> *Selkrig*, 1808 Mor., ‘Insurance’, Appendix, 33.

<sup>69</sup> The opinions are summarised at *ibid.*, 33. In essence the doctrine being expounded

a general rule of English law; if not, as argued for the bankrupt's trustee, the rule was 'demonstrative [...] of the mercantile law of insurance, which is not more the law of England than of this country'.<sup>70</sup> The argument continued:<sup>71</sup>

By this mercantile law, the Courts of Scotland must be guided in cases of insurance, though it were contrary to our general rules relative to contracts; but in truth it is not contrary to these rules, since it only applies to contracts of a form quite different from any of those to which these general rules ever were held applicable.

With one dissent from Lord Meadowbank, the court upheld this argument, Meadowbank's doubt being whether the general rules should yield to those of the law merchant given that actual payment of the premium to the underwriter (as distinct from the payment presumed from the policy in the law merchant) had yet to take place.<sup>72</sup>

A similar debate took place nearly thirty years later in *Strachan v McDougle*,<sup>73</sup> the case in which Lord Balgray uttered his already quoted doubts about applying the law of Scotland in an insurance case. The context in which these remarks can be placed should by now be apparent, and this is confirmed by the facts of the case and the decision of the court. The point at issue was whether an arrestment of a life assurance policy taken out with the Scottish Life Insurance Office (later to become known as Standard Life<sup>74</sup>) could

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was that eventually codified in the Marine Insurance Act 1906, s.53: see further Michael Lobban, 'The Law of Insurance' in William Cornish and others, *The Oxford History of the Laws of England Volume XII 1820-1914: Private Law* (Oxford, 2010), 674-727, 696-7. Proposals for reform of s.53 were canvassed in Law Commission and Scottish Law Commission, *Insurance Contract Law: Post Contract Duties and other Issues: a Joint Consultation Paper* (Law Com. C.P. No. 201, 2011; Scot. Law Com. D.P. No. 152, 2011), Parts 18-20.

<sup>70</sup> *Selkirk*, 1808 Mor., 'Insurance', Appendix, 36.

<sup>71</sup> *Ibid.*, 36. It should also be noted that the argument began with this proposition: 'In a question depending on a point of mercantile law, the desire of rendering the decisions on our law here uniform with those of the Courts of England, where that law has been so much longer known, and so much more fully considered, has always been the paramount principle in the minds of our Judges.' (*ibid.*, 36).

<sup>72</sup> See what may well be an eye-witness account of the debate between the judges at avizandum in Bell, *Commentaries*, II, 116, note 2. Note also several references to the law merchant in Boswell's pleadings in the Court of Session in 1770 (above note 63).

<sup>73</sup> *Strachan v McDougle* (1835) 13 S. 954.

<sup>74</sup> See Michael Moss, *The Building of Europe's Largest Mutual Life Company: Standard Life 1825-2000* (Edinburgh, 2000).

prevail against an unintimated assignation of the policy where the document had been delivered to the assignee. To complicate matters still further, the assignee lived in Berwick-upon-Tweed and was domiciled in England where, according to her counsel, 'in this and many similar instances, a right was effectually transferred, or a pledge effectually created, by mere deposit of the deeds constituting the right.' The Scottish requirement of intimation to complete an assignation, they argued, had no basis other than custom, whereas 'as policies of life insurance were of comparatively recent introduction, and, in some measure, belonged to mercantile law, it was unnecessary that there should be intimation at assigning them.' Further, 'the Assurance Office never paid till the policy was produced, and therefore the reason for intimation, to put a debtor on his guard, had no application.' Counsel for the arrester replied that the completion of assignation by intimation was a fundamental part of the law of Scotland, and while it rested on custom, so did a very large part of Scots law. Moreover, life assurance policies were not part of mercantile law, and the English law referred to was 'highly injurious and much regretted'. If the assignee's argument was upheld, life assurance policies would have the same 'extraordinary privileges' as bills of exchange and other negotiable instruments (i.e. be payable to bearer); this 'would be contrary both to principle and expediency'.<sup>75</sup>

The court held for the arrester and also rejected a conflict of laws argument that English rather than Scots law was applicable to the assignation. Lord Gillies was most worried by the possible effect of a contrary decision that would make life assurance policies in effect negotiable, while Lord Mackenzie also thought that if general Scots law principles were to be excluded by the law mercantile much more precise averments as to the law and practice of England and Europe were necessary. The Lord President was more hesitant, having in mind the insurers' established practice of requiring exhibition of the policy documents before they would pay out. Was there here a usage or custom of trade capable of displacing the general requirement of intimation? Lord Balgray concurred in the final decision in favour of the arrester, but he also made some general remarks about policies of life insurance:<sup>76</sup>

But they are a new species of instrument which are of recent introduction in England, and are still more recent here. But they are highly useful and beneficial. They have become important from the

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<sup>75</sup> All the quotations from the arguments of counsel may be found at (1835) 13 S. 957.

<sup>76</sup> *Ibid.*, 958.

extent to which the business of insurance is carried on, and this is every day increasing; and I think the Court ought to view them favourably, and give every facility, consistent with law, to their transference between debtor and creditor.

In truth, the life insurance market of the early nineteenth century could probably trace its beginnings back to the foundation of the Society for Equitable Assurances on Lives in London in 1762, and was not so very new. But in Scotland, ‘after the Scottish Widows Fund formed as the first Scottish life insurance office in 1815, six firms appeared between 1823 and 1826, and some twenty more by 1848.’<sup>77</sup> So it was indeed a recent and rapidly growing business phenomenon in Scotland in 1835. As the facts of *Strachan v McDougle* suggest, life assurance was not just a means of making individual savings and protecting the interests of the insured’s family but also a way of securing indebtedness, whether personal or commercial in origin. Hence, while there was room for doubt whether life assurance was as fully mercantile as marine insurance, it was certainly not an entirely personal and private matter between insurer and insured, cut off altogether from wider business interests.

### **Other Mercantile Contracts: (i) Sale**

A further line of enquiry prompted by Angelo’s work on insurance and bills is what was happening in the eighteenth and early nineteenth centuries to the many other mercantile contracts in Scots law, notably sale, hire (location), partnership (society) and mandate. Can we see the same kinds of shift and conflict between the established Scottish common law and mercantile custom or the law merchant? As we have already seen, Bell certainly thought that by his time society and mandate had moved far from their Roman origins.<sup>78</sup> While the replacement of society by partnership awaits its modern

<sup>77</sup> Timothy Alborn, *Regulated Lives: Life Insurance and British Society, 1800-1914* (Toronto, Buffalo and London, 2009), 25. See also Lobban, ‘Insurance’, 676-7, and other references there given. See further for Scotland C. W. Munn, ‘The Emergence of Edinburgh as a Financial Centre’ in A. J. G. Cummings and T. M. Devine (eds), *Industry, Business and Society in Scotland since 1700* (Edinburgh, 1994), 125-41, 136-7, and C. H. Lee, ‘The Establishment of the Financial Network’ in T. M. Devine and others (eds), *The Transformation of Scotland: The Economy since 1700* (Edinburgh, 2005), 100-27. The first Scottish case on life assurance I have noted is *Campbell v Allan* (1800) Mor., ‘Insurance’, Appendix No 3. The defender was an agent of the Westminster Insurance Society.

<sup>78</sup> See above, text accompanying note 57.

historian, Laura Macgregor has recently traced the development in Bell's time of agency, factory and brokerage alongside and, increasingly, in place of 'the amicable and gratuitous mandate'.<sup>79</sup> Here I would like to look briefly at developments in sale and hire.

As I have already suggested, sale in particular surely lies at the very root of commerce, and has always done so. How did sale and hire develop in Scotland during the period, and can we see there a similar or a different pattern of development to those found with insurance and bills? Another much missed colleague, the late Bill Gordon, has left us an overview of the history of sale in eighteenth- and early nineteenth-century Scotland.<sup>80</sup> He drew a picture in which a medieval customary law was gradually (but not completely) Civilianised, with Stair once again providing a significant impetus in that general trend. After the 1707 Union writers such as Forbes and Bankton showed awareness of English law in their accounts of sale, but more for its differences from Scots law than as an authority to be followed or considered by the Scottish courts. If there was reference in the eighteenth-century courts to English decisions or writers, Gordon does not mention it. Hume's account of sale is characteristically almost entirely based upon Scottish cases, with only glancing references to English (and indeed Roman) law.<sup>81</sup> Bell's *Commentaries* and *Principles* do however refer extensively to English law and cases along with, it must again be said, many references to Civilian and American sources as well as, of course, Scottish cases and writings.<sup>82</sup> It can be taken, therefore, that he was here following his usual approach as already described, looking to the law merchant rather than simply adopting English law wholesale. His posthumous *Inquiries* on the subject confirm this preference.

The first Scottish book devoted to sale was *A Treatise on the Law of Sale*, by Mungo Ponton Brown, advocate, published in Edinburgh in 1821.<sup>83</sup>

<sup>79</sup> Laura J. Macgregor, *The Law of Agency in Scotland* (Edinburgh, 2013), 49-80.

<sup>80</sup> William M. Gordon, 'Sale' in Reid and Zimmermann (eds), *History of Private Law*, II, 305-32, especially 305-19.

<sup>81</sup> Hume, *Lectures*, II, 3-55.

<sup>82</sup> Bell, *Principles*, §§ 85-132; Bell, *Commentaries*, I, 458-80.

<sup>83</sup> Brown is an obscure figure of whom little is known beyond the production of his treatise, perhaps because he died mid-career in 1832, sixteen years after his call to the bar. He was an Advocate-Depute in 1830. See Stephen P. Walker, *The Faculty of Advocates 1800-1986: A Biographical Dictionary of Members Admitted from 1 January 1800 to 31 December 1986* (Edinburgh, 1987), 19. Although Brown was thought of as a candidate to succeed Bell in the Edinburgh Scots Law Chair in 1827 (Reid, 'From Text-book to Book of Authority', 7), that did not come to pass as Bell himself failed to be appointed to the bench that year, and remained in the Chair until his death in



Brown stated that '[t]hroughout the greater part of [his] work, the general arrangement of Pothier's Treatise on the same subject has been followed',<sup>84</sup> hinting at a Civilian approach; and indeed throughout his book he cites Pothier (and quotes him in French), as well as the Digest, Domat and other *ius commune* authorities. But Brown's Preface points up from the start what is really the book's primary purpose:<sup>85</sup>

The Books of the Law of Scotland contain very ample materials for a separate treatise on the Contract of Sale; and much valuable matter has been added in the course of the last twenty years, in consequence of the practice which has prevailed so extensively during that period, of resorting for authority or illustration, upon questions connected with this branch of mercantile jurisprudence, to the decisions of the English Courts, and to the works of English writers. This practice, while it has contributed greatly to supply the materials required for such a work, has at the same time rendered it more desirable and necessary; because the English law of sale is, in some of its fundamental principles, altogether different from the law of Scotland, and unless those distinctions are rightly understood and kept in view, the utmost confusion of principle must ultimately result from the indiscriminate use of the English authorities.

In the present work, an attempt is made to exhibit in a systematical form, the principles and rules of the Contract of Sale, as they may be deduced from books of authority in the Law of Scotland, and from the decisions of the Court of Session; and at the same time, by an examination of the English authorities, to ascertain on the one hand, how far the doctrines of the Law of England upon this subject may be safely followed and relied on in analogous cases which may occur in our Courts; and, on the other hand, to point out the principles and maxims which are peculiar to the English law, and inconsistent with the principles and maxims which govern our practice.

The book begins with an 'Introductory Discourse', in which Brown sets out 'to state in general terms some of the leading distinctions between the Scotch

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1843.

<sup>84</sup> M. P. Brown, *A Treatise on the Law of Sale* (Edinburgh, 1821), vii–viii.

<sup>85</sup> *Ibid.*, v–vi.

and the English contract of sale'.<sup>86</sup> It is again worth quoting at length from the first couple of paragraphs of this introduction:<sup>87</sup>

1. It is obvious that the contract of sale must be substantially the same in all civilized countries, in as far as regards its general character, and in the ordinary consequences which result from it. From this circumstance we are naturally led to expect that the laws of different countries, in relation to this contract, should mutually illustrate each other. It appears, accordingly, to have been at all times the practice in our courts to resort for guidance and authority, in new and difficult cases of sale, not only to the civil law, which in Scotland has been the chief source from which the law of personal obligations has been drawn, but also to foreign systems of modern law, and to the judgments pronounced by foreign courts. In this way, the works of the English lawyers in particular, and the judgments of the English courts, have, for a long time, been allowed to be quoted in our courts, not only for the purposes of illustration, but in some cases as authorities to be relied upon and followed in the same manner as the decisions of our own judges. [...]

On the other hand, it is equally certain that, in a great many important particulars touching the nature and constitution of the contract of sale, as well as its effects, the law of Scotland is different from the laws of other countries, and particularly from the law of England.—While, therefore, it cannot be denied that the most beneficial consequences have resulted from the use of the foreign authorities, it is evident at the same time that the use of them must be kept within due bounds, and that unless it is restricted to matters in which the foreign law is truly analogous to the law of Scotland, the practice now alluded to will have no other effect than to mislead, and to introduce both confusion in principle and practical injustice.

2. These last observations are peculiarly applicable to the law of England, because while in *some* respects that system is both more strictly analogous to our own, and much more useful as a source of authority than any other system, it differs in other respects from the law of Scotland a great deal more than either the civil law, or the modern laws of the continental states. As the English law, therefore, is by far

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<sup>86</sup> Ibid., 3.

<sup>87</sup> Ibid., 1–2.

the most valuable source of illustration and authority to which we can resort in points in which it is analogous to the law of Scotland, this very circumstance renders it of the greater importance that we should be fully aware of the points of difference. Unless these are clearly understood, the use of the English authorities must, instead of being beneficial, become ultimately a source of confusion and error.

So alongside the authorities already mentioned, Brown does indeed cite and discuss, often at length, numerous English cases; the list in the book's table of English cases stretches to four pages as against the five for the table of 'Scotch' cases.

The first point to note is how similar all this appears to be to the picture set out above for insurance and bills of exchange. Reference to English law is justified by the fact that in its essentials the law of sale must be similar in all civilised countries, i.e. there is a *ius gentium*, or general mercantile jurisprudence, of sale, of which English and Scots law both form parts. In Brown's eyes, however, the period since 1800 had seen a strong tendency to rely on English cases as authorities in their own right, rather than as simply evidence of the *ius gentium*. It was not a tendency which Brown sought to resist, albeit he did seek to defend the principles and maxims of Scots law by presenting them systematically and in comparison, where appropriate, with English law. The aim was further, not simply to avoid incoherence, but also to prevent 'practical injustice'.

The only problem with all this, it might be suggested, is that, by giving so much attention to the English authorities, Brown actually reinforced rather than redirected the trend which his book sought to channel. But on the other hand there is little sign of the Scots law of sale becoming closer to its English counterpart in the first half of the nineteenth century. Bill Gordon at least saw 'no change of doctrine reflected in the case law' before the Westminster Parliament began to seek a more unified treatment of sales law in the Mercantile Law Amendment Act, Scotland, 1856, to be followed towards the end of the century by the much more strongly harmonising (and Anglicising) Sale of Goods Act 1893.<sup>88</sup> Each of these Acts is, of course, an indicator that significant differences did in fact continue to exist in the sales laws of the respective jurisdictions. And it is still true that the Scots common

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<sup>88</sup> Gordon, 'Sale', 323. See further Rodger, 'Codification of Commercial Law', 581–3.

law of sale, applying above all to land transactions, differs from the statutory rules for goods.<sup>89</sup> Perhaps, therefore, more research is required on the actual use of English case law in the Scottish courts both before and after 1821 as well as on the sources and influence of Brown's treatise itself to elucidate the character of the development of the law of sale in this period.

### Other Mercantile Contracts: (ii) Location or Hire

Location, or hire, was clearly another very important form of contract, covering, as Hume put it, 'a variety of the daily, and the most indispensable transactions of life'.<sup>90</sup> It embraced the hire of things (*locatio rei*), that is, both land and goods, and of the labour, work or services of persons (*locatio operarum*). The parties were the locator or lessor, who let the thing or service, and the conductor, or lessee or hirer, who hired the thing or service. Most writers up to and including Bell agreed that location was very similar to sale except that ownership of a thing let remained with the locator and did not pass to the conductor.<sup>91</sup> Bell pointed out another difference from sale in that risk never passed from the locator to the hirer unless there was 'a ground of liability against [the latter] by reason of negligent or faulty conduct'.<sup>92</sup> There was some debate, never really resolved, as to whether the conductor/hirer had to pay a price in money or could supply some other performance in return for his possession and use.<sup>93</sup> The Truck Act 1830 at least made clear that non-domestic servants – what Bell called 'the hiring of workmen in a manufactory'<sup>94</sup> – had to be paid in money. Finally, location could be usefully distinguished from other contracts also involving the transfer of possession: deposit, because it was gratuitous, and loan, either because it too was gratuitous when in the form of *commodatum*, or because the borrower did not have to return the specific thing lent, as in *mutuum*. Location of labour, work or services could also be

<sup>89</sup> Note A. D. M. Forte, 'A Civilian Approach to the Contract of Exchange in Modern Scots Law', *South African Law Journal*, 101 (1984), 691–704.

<sup>90</sup> Hume, *Lectures*, II, 56.

<sup>91</sup> See Stair, *Institutions*, 1,15,1; Bankton, *Institute*, I,20,1; Erskine, *Institute*, III,3,14; Bell, *Commentaries*, I, 481; *Principles* § 133, note.

<sup>92</sup> Bell, *Commentaries*, I, 481.

<sup>93</sup> Stair, *Institutions*, 1,15,1; Forbes, *Institutes*, 201; Bankton, *Institute*, I,20,1; Erskine, *Institute*, III,3,14; Hume, *Lectures*, II, 59. Bell (*Commentaries*, I, 481; *Principles* §§ 133–4) is non-specific on the point. Note that the Supply of Goods and Services Act 1982, c.29, s.11G(1), (3), allows the hire to be other than money (see also section 6 of the Consumer Rights Act 2015).

<sup>94</sup> Bell, *Principles*, § 171; note also *ibid.*, § 191 ('workmen or artisans').

distinguished from mandate, since in the latter the service had to be provided gratuitously. Bankton also discussed the strict liabilities of ship-masters, inn-keepers and stablers under the Praetorian edict *nautae, caupones, stabularii*, ‘as a distinct contract’, while suggesting that their holding of customers’ goods, ‘being for hire, [...] rather resembles Location’.<sup>95</sup> For Stair and Erskine, however, this edictal liability was an aspect of deposit, while for Forbes it was quasi-contractual, arising from the presumed consent of parties.<sup>96</sup>

Stair’s prime examples of location were the letting of land and work.<sup>97</sup> The same largely holds good for Forbes, Bankton and Erskine; their references on the subject are mainly to the Digest, with only occasional citations of Scottish cases.<sup>98</sup> Erskine’s treatment of location as a distinct heading is however confined to moveables; elsewhere he noted that, while leases or tacks of land were truly contracts of location, they needed separate treatment because ‘they have by statute received special qualities which distinguish them from the common contract of location’,<sup>99</sup> the principal reason for this being the real right which had effectively been created for tenants by the Leases Act 1449. Hence he dealt with the whole subject in his discussion of heritable property,<sup>100</sup> the first breakdown in the generality of the treatment of location.<sup>101</sup>

Bankton introduced a topic which had not been previously discussed at all as an aspect of location in the major Scots law books when, in his observations on the law of England in relation to hire, he considered mostly the strict liabilities of the common carrier, that is, ‘all persons carrying goods for hire,

<sup>95</sup> Bankton, *Institute*, I,16,1.

<sup>96</sup> Stair, *Institutions*, I,13,3 (see also *ibid.*, I,9,5 (reparation), and I,12,18 (mandate)); Erskine, *Institute*, III,1,28; Forbes, *Institutes*, 213–4; Forbes, *Great Body*, fs 921–4.

<sup>97</sup> Stair, *Institutions*, I,15.

<sup>98</sup> Forbes, *Institutes*, 200–1; Forbes, *Great Body*, fs 845–51; Bankton, *Institute*, I, 20; Erskine, *Institute*, III,3, 14–16.

<sup>99</sup> Erskine, *Institute*, II,6,20.

<sup>100</sup> *Ibid.*, II,6, 20–64.

<sup>101</sup> So Walter Ross later included a chapter on tacks in his *Lectures on the History and Practice of the Law of Scotland relative to Conveyancing and Legal Diligence*, delivered in 1783 and 1784 and published in Edinburgh in 1792 (2nd edn, Edinburgh, 1822). Lease of land was the only aspect of location to develop as a monograph subject. George Joseph Bell’s brother Robert, a Writer to the Signet and later an advocate also, published *A Treatise on Leases explaining the Nature, Form, etc of the Contract of Lease and Legal Rights of the Parties* in 1803. The book ran to four editions, the last appearing in two volumes in 1825 (Edinburgh) and 1826 (Edinburgh). It was then apparently superseded by Robert Hunter’s *Treatise on the Law of Landlord and Tenant*, which first appeared in 1833 and enjoyed three more editions, in 1845, 1860 and 1876 (Edinburgh).

as masters and owners of ships, lightermen, stage-coachmen, etc'.<sup>102</sup> He noted that the common carrier's liability is

a political institution of the law of England, that people may be safe in their dealings; and, if it were otherwise, carriers, that are frequently trusted with things of the greatest value, would often be tempted to confederate with thieves and robbers, and, on such affected pretences, defraud their employers.<sup>103</sup>

He then added: 'It is thought that this will hold with us [*i.e. in Scots law*], for the same reason, tho' we have no express law nor precedents, that I know, for it.'<sup>104</sup> In his chapter on 'the distinct contract' derived from the edict *nautae, caupones, stabularii*, Bankton suggested that this strict liability extended to common carriers.<sup>105</sup> Erskine too touched on this in his treatment of the edict as deposit:<sup>106</sup>

This edict is, by the usage of Scotland, extended to vintners in boroughs, though they be not innkeepers; *Master of Forbes*, 17 Feb 1687; and to householders who take in lodgers: *May*, 10 July 1694; and would possibly, from the parity of reason, be also applied against carriers.

Erskine also brought carriage into his account of location, however, when he noted, almost in passing, that a contract 'by which the owner of a ship or vessel freights her to a merchant for the transportation of goods from one port to another, for a certain sum, to be paid either by the day or upon the whole voyage, is a species of location.'<sup>107</sup> While hiring a ship could be seen as *locatio rei*, a contract merely to carry looked more like *locatio operarum* with, however, the additional feature that the locator also received goods (or, indeed, persons in passenger transport) from the conductor. This may explain the general non-appearance of carriage in discussions of location up to the time of Bankton and Erskine.<sup>108</sup> Stair had touched upon carriage by ship in his account of

<sup>102</sup> Bankton, *Institute*, I, 20, Observations on the Law of England, no. 2.

<sup>103</sup> *Ibid.*, no. 1.

<sup>104</sup> *Ibid.*.

<sup>105</sup> Bankton, *Institute*, I, 16, 5. Note also Zimmermann, *Obligations*, 514–26.

<sup>106</sup> Erskine, *Institutes*, III, 1, 29.

<sup>107</sup> *Ibid.*, III, 3, 17.

<sup>108</sup> But note Alexander King, *Tractatus legum et consuetudinem navalium* (1590), title 6 ('De locatione et conductione navium'), a reference I owe to J.D. Ford and his as yet unpublished edition of this MS. treatise. In Roman times, carriage by sea where

mandate, noting however that ‘all Admiralties [...] are proper judges of these matters’;<sup>109</sup> while Forbes put carriage by ship as another quasi-contract.<sup>110</sup>

Hume’s treatment of location reunified the subject by dwelling at length upon the tack of land before turning relatively briefly to *locatio operarum*, the use of a thing or of service and labour. He too treated of carriage of goods and persons by land, presumably a subject of increasing significance as the landward transport infrastructure for the country as a whole improved around him,<sup>111</sup> before turning to a separate treatment of ‘one instance more, and a frequent one, of this sort of location, – of the use of a thing’, carriage of goods by sea and the hire of ships.<sup>112</sup> Throughout his citations are to Scottish cases, with only very occasional references to Roman and English law. Hume followed Bankton in noting that the common or public land carrier’s strict liability had been adopted as a matter of policy in Scotland and other countries, extending the principle of the edict *nautae, caupones, stabularii*, but he doubted whether Scots law would go so far as English law in the celebrated case of *Coggs v Bernard* in making the common carrier liable even for the robbery of the goods being carried.<sup>113</sup> England was thus the other country he had most prominently in mind on this topic. Alan Rodger as long ago as 1968 suggested that the development of edictal liability for land carriers in Scotland came about, not by analogising them (as Bell and others were to do in the early nineteenth century) with *nautae* as sea carriers, but because inn-keepers (*caupones*) were

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the merchant transporting goods was not also the ship-owner seems to have been financed by loans (*jenus nauticum*) to the merchant in which the risk of failure was on the lender: Zimmermann, *Obligations*, 181–6. On arrangements in the medieval period see Edda Frankot, ‘Of Laws of Ships and Shipmen’: *Medieval Maritime Law and its Practice in Urban North Europe* (Edinburgh, 2012), 7–9; and for the early modern period see also J.J. Brown, ‘Merchant Princes and Mercantile Investment in Early Seventeenth-century Scotland’ in M. Lynch (ed.), *The Early Modern Town in Scotland* (London, Sydney and Wolfenboro, N.H., 1987), 125–46; P. G. B. McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich* (2 vols, Stair Society vols 21–22, Edinburgh 1962–3), II, 618–19 (‘Anent frauchting of schippis’; but note the reference at c.XXII to the master who ‘frauchtis or lettis to hire his schip to ane merchand’); William Welwood, *The Sea Laws of Scotland* (2nd edn, Edinburgh, 1592), title 2 (‘Of fraughting of schipis’); idem, *Abridgement*, title 7 (‘The fraughting of ships’). On Welwood see further J. D. Ford, ‘William Welwood’s Treatises on Maritime Law’, *Journal of Legal History*, 34 (2013), 172–210, especially 186.

<sup>109</sup> Stair, *Institutions*, I, 12, 18.

<sup>110</sup> Forbes, *Institutes*, 196; *Great Body*, f. 924.

<sup>111</sup> Hume, *Lectures*, II, 100, 104–8.

<sup>112</sup> Ibid., II, 109–24 (quotation at ibid., 109; note also ibid., 102–3).

<sup>113</sup> Ibid., II, 104–5. See also *Coggs v Bernard* (1703) 2 Ray. 900, 1 Salk. 26.



often also in the business of hiring out carriages and coaches;<sup>114</sup> but it may be that the English position, based as it was on public policy considerations, was the chief influence in changing the law to meet changing trading conditions in Scotland during the second half of the eighteenth century.

English law certainly comes fully into view in Bell's treatments of what he firmly called hiring rather than location.<sup>115</sup> As usual he cites English alongside Scottish cases, and also refers to Pothier's work, this time mostly the treatise on the *Contrat de Louage*, as well as Story's *Commentary on Bailments* and the relevant part of Kent's *Commentaries on American Law*.<sup>116</sup> In addition he refers to Sir William Jones' famous *Essay on the Law of Bailments* for English law, remarking that in it Jones 'has shown how the learning of a scholar and the liberality of a gentleman may be combined with the correctness of legal analysis'.<sup>117</sup> Jones was also an admirer of Pothier and a proponent of natural law along with the idea of law as a universal science, who could write of responsibility for negligence in the contract of bailment 'that a perfect harmony subsists on this interesting branch of jurisprudence in the codes of nations most eminent for legal wisdom, particularly of the Romans and the English'.<sup>118</sup> There was, in other words, a *ius gentium* in this field of law. It was an understanding very much in line with Bell's perception of how the law should be developed in relation to mercantile affairs.

So, on the responsibility of the hirer for injury received by the subject of the hire, Bell comments that 'the doctrine maintained by Pothier, and

<sup>114</sup> Alan Rodger, 'The Praetor's Edict and Carriage by Land in Scots Law', *Irish Jurist*, 3 (1968), 175–86, especially 183–5. Note further Bell, *Commentaries*, I, 498: 'Innkeepers are responsible, on the principle of the edict, for whatever is placed under their charge, or that of their servants [...] Where an article is given to an innkeeper to be sent by a carrier or coach going from his house, he is liable for it. But it has been doubted whether, under this law, an innkeeper is responsible for a parcel addressed to one who was not a guest but merely called at his inn, and went on with post-horses.'

<sup>115</sup> Bell, *Principles*, §§ 133–93; *Commentaries*, I, 481–505.

<sup>116</sup> Robert Joseph Pothier, *Traité du Contrat de Louage* (Paris, 1764 and many subsequent editions; not translated into English until the mid-twentieth century: G. A. Mulligan (ed.), *Pothier's Treatise on the Contract of Letting and Hiring (contrat de louage)* (Durban, S.A., 1953); James Kent, *Commentaries on American Law* (New York, 1826–30), Lecture 40; Joseph Story, *Commentaries on the Law of Bailments: with Illustrations from the Civil and the Foreign Law* (Cambridge, Mass., 1832).

<sup>117</sup> Bell, *Commentaries*, I, 483, note 1. Jones' *Essay* was first published in 1781 and had three further editions in England, the last in 1833. I have used the modern edition (based on the 1781 edition) edited with an introduction by David J. Ibbetson and published as the fourth volume in the Welsh Legal History Society series (Bangor, 2004).

<sup>118</sup> Jones, *Essay on Bailments*, para. 17.

vindicated by Sir William Jones, is the established law of Scotland'.<sup>119</sup> This was the doctrine of *culpa lata*, *culpa levis*, and *culpa levissima* by which, where the contract was reciprocally beneficial to both parties (as in hire), the possessor's liability should be for 'ordinary neglect only'; where it benefited only the owner (as in gratuitous deposit), the possessor should be liable for gross neglect only; and where it benefited only the possessor (as in gratuitous loans), the latter should be liable for the slightest neglect.<sup>120</sup> Bell deploys this analysis in his *Principles* and his *Commentaries*.<sup>121</sup>

Bell's treatment of the praetorian edict is further indicative of the general approach of developing the law in mercantile matters to meet current practical issues identifiable through comparative study rooted in ideas of the *ius gentium* and the law merchant. The edict takes liability beyond the realms of the different kinds of *culpa*, on policy grounds recognised 'even in those countries where the Roman law has no avowed authority', i.e. England.<sup>122</sup> As already noted, on that basis Bell then applies the edict to the liability of the land carrier by analogy with the liability of the sea carrier.<sup>123</sup> There is a more general observation reflecting an understanding built on the *ius gentium* and the law merchant:<sup>124</sup>

This edict is not to be considered as positive law in Scotland, but as effectual only in so far as it has become a part of the maritime law of Europe, or as by its general policy it stands recommended to our adoption, and is now in its great principle recognised as a part of our jurisprudence.

Hire remains unequivocally hire in Bell's treatments, however, despite the link through Jones to the much wider English concept of bailment, which includes but is not limited to hire.<sup>125</sup> Bell covers the familiar ground of *locatio rei* and *locatio operarum*. The latter is however broken up into a number of sub-groups

<sup>119</sup> Bell, *Commentaries*, I, 483.

<sup>120</sup> Pothier's fullest discussion of these principles is in his essay, *De la Prestation des Fautes* (usually found appended to his *Traité des Obligations*); I have used the edition in M. Bugnet (ed), *Oeuvres de Pothier* (10 vols, Paris, 1861), ii, 497–501. See also Jones, *Essay on Bailments*, paras 6–16.

<sup>121</sup> Bell, *Principles*, §§ 232–4; Bell, *Commentaries*, I, 483.

<sup>122</sup> *Ibid.*, I, 495.

<sup>123</sup> *Ibid.*, I, 496.

<sup>124</sup> *Ibid.*, I, 495.

<sup>125</sup> See further below, text accompanying notes 129–130.

which appear to be of Bell's own devising. 'Labour and service' (which in turn is split into 'common' and 'skilled', the latter applying to professional persons, the former to the case where the workman is provided with the materials to be worked on, for example repair) is separated off from 'services' (where the division is that already mentioned between the domestic and the manufactory servant); the distinction appears similar to the modern one between a contract for services and a contract of service (employment). Carriage of goods, including inland carriage, is another form of hiring.

The one point at which Bell appears to expand the traditional scope of location in Scots law is when, following Jones,<sup>126</sup> he talks of 'hiring of care and custody'. Although elsewhere Bell discusses the old gratuitous contract of deposit,<sup>127</sup> the reality of non-owners having the safe-keeping of others' goods for commercial purposes and commercial returns had to be brought within the scope of legal analysis: 'This is the contract which regulates the duties of depositaries for hire, wharfingers, warehousemen, livery stablers, and persons who keep depasturing fields for cattle.'<sup>128</sup> Custody did however, like carriage, cut a slightly difficult figure as a form of location; while the locator clearly provided a service, he also received possession of goods from the conductor as well as the price paid for the service.

We can however see Bell deploying at least the idea of bailment when structuring his account of Scots law in cognate areas. In English law bailment (the etymology, according to Jones, being from the old French verb *bailler* meaning to deliver<sup>129</sup>) covered a range of situations where property was delivered with the intention that 'the recipient should have only the temporary use or profits of the thing (loan or hire) or should hold it passively as a pawn or deposit'.<sup>130</sup> Bell's departure from the Roman structure of contracts in favour of a more functional approach based on commercial realities has already been mentioned.<sup>131</sup> In his *Principles*, hiring was the first of a group of contracts treated under the heading 'Contracts Accompanied by Confidential Possession', the remainder being, in order, loan, pledge, deposit and, finally, mandate and factory; that is, a mixture of those traditionally considered as

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<sup>126</sup> Jones, *Essay on Bailments*, para. 129.

<sup>127</sup> Bell, *Commentaries*, I, 277-8; *Principles*, §§ 210-15.

<sup>128</sup> *Ibid.*, § 155. See also Bell, *Commentaries*, I, 488.

<sup>129</sup> Jones, *Bailments*, para. 121. *Bail* is still the French for lease.

<sup>130</sup> J. H. Baker, *An Introduction to English Legal History* (4<sup>th</sup> edn, London Belfast and Edinburgh, 2002), 389.

<sup>131</sup> See above, text accompanying notes 53-57.

either consensual or real.<sup>132</sup> ‘These are contracts,’ Bell told his students, ‘in which there is necessarily entrusted to one the custody, or use, or manufacture, of the property of another; called Bailment in the law of England and of America, but not distinguished in Scotland by any technical name.’<sup>133</sup> In the *Commentaries*, Bell noted that the same group of contracts were instances of property and possession of things being in different hands, and explored the consequences in the bankruptcy of the possessor, the general rule being that the owner could reclaim the property in question subject to any set off to which the bankrupt might be entitled. The exceptions were loans falling into the category of *mutuum*, collusive sale and lease-back transactions, and the unpaid pledgee. But particularly in factories several nice points fell to be discussed in detail.<sup>134</sup> While clearly in Scots law nothing closely approximated to the English idea that in some circumstances a bailee might have some kind of proprietary claim to the thing bailed, it must be doubtful how far Bell would have been able to take the analysis just summarised without the issue having been put into his mind by the comparison with bailment.

### Concluding Remarks

The ruminations just offered are no more than a first tentative toe in the water from one who, for reasons already given, does not much relish voyaging in such deep and potentially stormy waters. I have sought to take a little further Angelo’s basic point that in mercantile matters Scots law was developed through understandings of a *ius gentium* and a law merchant for which the most readily available (but not the only) evidence was the decisions of the English courts; a development which became, despite resistance, a recognition of those decisions as authorities rather than simply evidence of some wider general norms. Further attempts to trace the eddying currents of development in commercial law must be left to others better equipped to undertake the voyage. The project in which Angelo was very largely the first adventurer, has, in other words, a long way still to go; and it is very sad that he will not be around to pilot it further across the ocean. But re-reading his work has reminded me of many other good things. He introduced me to the verbs ‘to predicate’ and ‘to adumbrate’. He liked to be blunt and to speak frankly. He was fascinated by medieval law as well as medieval ships. His engagement with the Northern world of Orkney as well as

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<sup>132</sup> Bell, *Principles*, §§ 133–244. See also Bell, *Commentaries*, I, 481–545.

<sup>133</sup> Bell, *Principles*, un-numbered paragraph between §§ 132 and 133.

<sup>134</sup> Bell, *Commentaries*, I, 274–88.

the Vikings in general led on to the late turn of his work to Celtic law and the promising comparisons he drew between it and medieval Norse law. There was a very great deal about Angelo to love and admire; I miss his congenial presence and wide-ranging mind immensely.